The New Zealand Law Journal

The Ellis case

The Minister of Justice appears proud to say that he refuses to read Lynley Hood's book *A City Possessed*. This is unfortunate as there are numerous lessons to be learned from the saga that are of value today, regardless of the issue of Ellis's guilt. On that issue alone, we are witnessing the kind of establishment obstinacy and public dissatisfaction that led in Britain to the Criminal Cases Review Commission.

The Minister shelters behind the Court of Appeal and the report by Sir Thomas Eichelbaum, but this is not good enough. One of Lynley Hood's achievements, as a non-lawyer, is an astute criticism of the shortcomings of the various methods available to review criminal convictions. Each of the reviews and appeals suffered from some limitation, self-imposed or otherwise. *A City Possessed* is the first attempt at a review of the whole case from the investigation onwards.

The first issue obviously is whether Ellis should have been convicted. No one who has read the confusion and contradiction displayed by the witness statements that Hood recites can be happy that the convictions are safe. The Court of Appeal confessed to having read only extracts of the statements, but this is not enough to make one content with them, whereas relevant extracts are sufficient to show that witnesses were confused, self-contradictory and unreliable. Either Sir Thomas did not read those statements because, like everyone else he restricted himself to the filleted evidence that the Judge allowed in, or, with respect, his judgment is at fault.

Regardless of that issue, however, there are several systemic matters which clearly require attention and which, it seems, require attention today just as much as a decade ago.

Police investigation: the investigation in the Ellis saga suffered from a clear fault which was that it was driven by a junior officer with a bee in his bonnet. Senior officers seem almost never to have exercised independent judgment: they evidently regarded themselves as the heavy guns to be wheeled out whenever the OiC needed. It is clearly inappropriate that a multiple victim case involving serious criminal allegations, important legal and policy questions relating to evidence and major budgetary issues should have been conducted by an officer of the rank of Detective. Exactly the same thing seems to have happened again in the *Sotheran* Dash-8 crash case where either the Detective concerned was being used as a front to shelter the real decision makers, or another hugely expensive and complex investigation was conducted without any leadership from supervising officers.

Section 23G of the Evidence Act: this section is meaningless nonsense. This is not hindsight, it was said at the time it was passed. The section authorises the giving of evidence about whether behaviour is consistent or inconsistent with sexual abuse. "Inconsistent" means "logically impossible in combination with" and "consistent" simply means "not inconsistent". There is no behaviour that is inconsistent with sexual abuse and so the DSAC manual instructed doctors to report all behaviour as "consistent with sexual abuse". This is clearly not understood by most lawyers and police, who, surveys show, think that "consistent" means "provides supporting evidence for". Sadly, the Law Commission draft Evidence Code just reiterates this nonsense verbatim. It should be repealed. The kindest thing that can be said for those responsible for it is that they cannot have known what they were doing.

Psychological evidence: little psychological evidence stands up to serious scrutiny. Psychologists have managed to con the system for years with nonsense such as "offender profiling" which has no scientific basis whatever. The fact is that psychology completely lacks a general theory of human behaviour and the divisions between schools of psychology are as deep as argument about whether the earth goes round the sun or vice versa. Few psychologists understand the logical structure of evidence they are giving, as surveys of numerous cases, listening to them speak on this and other issues at seminars, and personal experience of trying to train them in evidence-giving demonstrates. Almost no statements made by psychologists are backed up by the population data necessary to give the evidence probative value. The so-called "prosecutor's fallacy" is endemic. Recently a psychologist on television suggested that many premature births are due to stress events in pregnancy. To prove this she interviewed mothers who had given birth prematurely and discovered that some high proportion of them had suffered stress events in pregnancy. This, she said, proved her theory. Much psychological evidence in real Court cases in New Zealand and elsewhere has been as unintelligent as this. The mystical hold that psychologists seem to have over the legal system should be broken.

The appeal structure: The position in a criminal appeal appears to be this. If you are an undoubted criminal caught red-handed but you can point to some defect in police procedure, the Court of Appeal will exercise a power it has arrogated to itself and which Parliament never intended it to have, to rule the evidence inadmissible and set you free. If on the other hand, you argue that you are innocent and have only been convicted because of misjudgments by the trial Judge and by the jury, the Court of Appeal will refuse to exercise the power Parliament intended it to have to revisit the conduct of the trial and the evidence available. This is not how to create confidence in the criminal justice system. ❐